

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General (“OIG-HHS”) of the Department of Health and Human Services (“HHS”) (collectively the “United States”), the State of Wisconsin, Aurora Health Care, Inc., Robert W. Ninneman, M.D., and Lisa A. Baratta, M.D. (collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. Aurora Health Care, Inc. and its affiliates (“Aurora”) are part of Advocate Aurora Health, Inc., which is an integrated health care system providing health care services to communities throughout eastern Wisconsin, Illinois, and the upper peninsula of Michigan.

B. Aurora’s patients include individuals covered by the Medicare Program, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1 (“Medicare”), and the Medicaid Program, 42 U.S.C. §§ 1396-1396w-5 (“Medicaid”).

C. On May 28, 2013, Robert W. Ninneman, M.D., and Lisa A. Baratta, M.D., (collectively referred to as “Relators”) filed a *qui tam* action in the United States District Court for the Eastern District of Wisconsin captioned United States and the State of Wisconsin *ex rel.* Robert W. Ninneman, M.D., and Lisa A. Baratta, M.D. v. Aurora Health Care Metro, Inc. *et al.*, Civil Action No. 13-C-591, pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b), and similar State laws (the “Civil Action”). The United States and the State of Wisconsin anticipate that they will intervene in the Civil Action for the purpose of settlement and dismissal upon the execution of this Settlement Agreement.

D. The Physician Self-Referral Law, 42 U.S.C. § 1395nn (the “Stark Law”) prohibits any person or entity from presenting or causing to be presented any claims for payment to

Medicare for certain “designated health services” provided to patients who were referred by a physician with whom the entity that provides the DHS has a financial relationship, unless that relationship satisfies the requirements of an exception to the Stark Law’s application. Medicare payments may not be made for services furnished as the result of a referral made in violation of the Stark Law. *Id.* § 1395nn(g)(1).

E. The United States and the State of Wisconsin contend that they have certain civil claims against Aurora for engaging in the following alleged conduct (the “Covered Conduct”): Aurora entered into compensation arrangements with two physicians during the period of December 1, 2008, to December 31, 2012, that the United States and the State of Wisconsin contend did not satisfy the requirements of an exception to the Stark Law because the compensation arrangements were not commercially reasonable and because the compensation exceeded the fair market value of the cardiovascular services these physicians actually provided, took into account the anticipated referrals to be generated by these physicians, and was not for identifiable services. The identities of the physicians and the specific time periods at issue for each physician are contained in a separate letter dated November 30, 2018, and are incorporated by reference into this agreement. During those periods, Aurora submitted claims to Medicare and Medicaid for certain designated health services for patients referred by these physicians. The United States and the State of Wisconsin contend that engaging in the Covered Conduct violates the Stark Law and similar State laws, and gives rise to civil liability under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* and similar State laws.

F. This Settlement Agreement is neither an admission of liability by Aurora nor a concession by the United States that its claims are not well founded.

G. Relators claim entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Settlement Agreement and to Relators’ reasonable expenses, attorneys’ fees, and costs.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. Aurora shall pay to the United States and the State of Wisconsin the total sum of \$12,000,000 (“Settlement Amount”), of which \$7,934,965 is restitution, as follows:

a. Aurora shall pay to the United States the sum of \$11,736,595 no later than 10 days after the Effective Date of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the Office of the United States Attorney for the Eastern District of Wisconsin.

b. Aurora shall pay to the State of Wisconsin the sum of \$263,405 no later than 10 days after the Effective Date of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the State of Wisconsin.

2. Conditioned upon the United States and the State of Wisconsin receiving the Settlement Amount from Aurora and as soon as feasible after receipt, the United States and the State of Wisconsin shall pay \$1,560,000 to Relators by electronic funds transfer, as follows:

a. The United States shall pay \$1,525,757 to Relators.

b. The State of Wisconsin shall pay \$34,243 to Relators.

3. Aurora shall pay to Relators \$97,746.70 for expenses, attorney’s fees, and costs pursuant to 31 U.S.C. § 3730(d) no later than 10 days after the Effective Date of this Agreement.

4. Subject to the exceptions in Paragraph 7 (concerning excluded claims) below, and conditioned upon Aurora’s full payment of the Settlement Amount, the United States releases Aurora from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties

Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law theories of payment by mistake, unjust enrichment, and fraud.

5. Subject to the exceptions in Paragraph 7 (concerning excluded claims) below, and conditioned upon Aurora's full payment of the Settlement Amount, the State of Wisconsin releases Aurora from any civil or administrative monetary claims the State of Wisconsin has for the Covered Conduct under Wisconsin's Medical Assistance Law, Wis. Stat. § 20.931, Wisconsin's False Claims Act, Wis. Stat. § 49.485, Wisconsin's Medical Assistance offenses, Wis. Stat. §§ 49.49, 946.91; or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud.

6. Subject to the exceptions in Paragraph 7 (concerning excluded claims) below, and conditioned upon Aurora's full payment of the Settlement Amount, Relators, for themselves and their heirs, successors, attorneys, agents, and assigns, release Aurora from any civil monetary claim the Relators have on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733 or on behalf of the State of Wisconsin for the Covered Conduct under Wisconsin's Medical Assistance Law, Wis. Stat. § 20.931.

7. Notwithstanding the releases given in paragraphs 3, 4, and 5 of this Agreement, or any other term of this Agreement, the following claims of the United States and the State of Wisconsin are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code) or any State revenue codes;
- b. Any criminal liability;
- c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory or permissive exclusion from Federal or State health care programs;

- d. Any liability to the United States (or its agencies) or the State of Wisconsin for any conduct other than the Covered Conduct;
- e. Any liability to the State of Wisconsin arising from the Covered Conduct for claims submitted or caused to be submitted to any “managed care entities” as defined by 42 U.S.C. § 1396u-2;
- f. Any liability based upon obligations created by this Agreement; and
- g. Any liability of individuals.

8. Relators and their heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B). Conditioned upon Relators’ receipt of the payment described in Paragraph 2, Relators and their heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States and the State of Wisconsin, their agencies, officers, agents, employees, and servants, from any claims arising from the filing of the Civil Action or under 31 U.S.C. § 3730, and from any claims to a share of the proceeds of this Agreement and/or the Civil Action.

9. Aurora waives and shall not assert any defenses Aurora may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

10. Aurora fully and finally releases the United States and the State of Wisconsin, their agencies, officers, agents, employees, and servants, from any claims (including attorney’s fees, costs, and expenses of every kind and however denominated) that Aurora has asserted, could have asserted, or may assert in the future against the United States or the State of

Wisconsin, their agencies, officers, agents, employees, and servants, related to the Civil Action and the Covered Conduct, as well as the United States' and the State of Wisconsin's investigation and prosecution thereof.

11. Aurora fully and finally releases Relators from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Aurora has asserted, could have asserted, or may assert in the future against the Relators, related to the Civil Action and the Covered Conduct, as well as the Relators' investigation and prosecution thereof.

12. The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicare contractor (e.g., Medicare Administrative Contractor, fiscal intermediary, carrier) or any state payer, related to the Covered Conduct; and Aurora agrees not to resubmit to any Medicare contractor or any state payer any previously denied claims related to the Covered Conduct, agrees not to appeal any such denials of claims, and agrees to withdraw any such pending appeals.

13. Aurora agrees to the following:

a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47; and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1 and 1396-1396w-5; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Aurora, its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this;
- (2) any audit(s) and civil investigation(s) of the matters covered by this Agreement;

- (3) Aurora's investigation, defense, and corrective actions undertaken in response to any audit(s) and civil investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);
- (4) the negotiation and performance of this Agreement; and
- (5) the payment Aurora makes to the United States and the State of Wisconsin pursuant to this Agreement and any payments that Aurora may make to Relators, including costs and attorney's fees;

are unallowable costs for government contracting purposes and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program (FEHBP) (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by Aurora, and Aurora shall not charge such Unallowable Costs directly or indirectly to any contracts with the United States or any State Medicaid program, or seek payment for such Unallowable Costs through any cost report, cost statement, information statement, or payment request submitted by Aurora or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Aurora further agrees that within 90 days of the Effective Date of this Agreement it shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid and FEHBP fiscal agents, any Unallowable Costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by Aurora or any of its subsidiaries or affiliates, and shall request, and agree, that such cost reports, cost statements, information reports, or

payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the Unallowable Costs. Aurora agrees that the United States, at a minimum, shall be entitled to recoup from Aurora any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted cost reports, information reports, cost statements, or requests for payment.

Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The United States reserves its rights to disagree with any calculations submitted by Aurora or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on Aurora or any of its subsidiaries or affiliates' cost reports, cost statements, or information reports.

d. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or re-examine Aurora's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

14. This Agreement is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity, except to the extent provided for in Paragraph 15 (waiver for beneficiaries paragraph), below.

15. Aurora agrees that it waives and shall not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as Covered Conduct.

16. Upon receipt of the payment described in Paragraph 1, above, the United States, the State of Wisconsin, and Relators shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal of the Civil Action pursuant to Rule 41(a)(1). The Stipulation shall call

for such dismissal without prejudice to the United States and the State of Wisconsin, and with prejudice to Relator.

17. Except as provided for in Paragraph 3, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

18. Each party and signatory to this Agreement represents that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion.

19. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the Eastern District of Wisconsin. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

20. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

21. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

22. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.


23. This Agreement is binding on Aurora's successors, transferees, heirs, and assigns.

24. This Agreement is binding on Relators' successors, transferees, heirs, and assigns.

25. All parties consent to the United States' or the State of Wisconsin's disclosure of this Agreement, and information about this Agreement, to the public.

26. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles and electronic transmissions of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.


THE UNITED STATES OF AMERICA

DATED: 12/10/18 BY: 
MATTHEW D. KRUEGER
United States Attorney
Eastern District of Wisconsin

DATED: 12/07/18 BY: 
LISA M. RE
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and Human Services

THE STATE OF WISCONSIN

DATED: 11/29/2018


BY: 
FRANCIS X. SULLIVAN
Director of the Medicaid Fraud Control
and Elder Abuse Unit
Wisconsin Department of Justice

DATED: 11/29/2018

BY: 
ANTHONY BAIZE
Inspector General
Office of the Inspector General
Wisconsin Department of Health Services

AURORA HEALTH CARE, INC.

DATED: 12/3/18

BY: 
MICHAEL M. GREBE
Assistant Secretary
Aurora Health Care, Inc.

DATED: 12/3/18

BY: 
DAVID M. GLASER
Counsel for Aurora Health Care, Inc.

RELATORS

DATED: 11/30/18

BY:


ROBERT W. NINNEMAN, M.D.

DATED: 11/30/18

BY:


LISA A. BARATTA, M.D.

DATED: 11/30/18

BY:


PATRICK J. KNIGHT
Gimbel, Reilly, Guerin & Brown LLP
Counsel for Relators